Supreme Court, U.S.
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No. 96-1180

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1996

FT ROYAL KING, #592205; ROYAL KING FISHERIES, Inc., and ROYAL SEAFOODS, INC.,
Petitioners,

v.

VILMOS FUSZEK,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESTATEMENT OF QUESTION PRESENTED FOR REVIEW

Section 53 of the Federal Employer's Liability Act, 45 U.S.C. § 53 prohibits a reduction of an employee's damages for comparative negligence where the employer's violation of "any statute enacted for the safety of employees contributed to the death or injury of such employee." Did the Court of Appeals err in holding that Section 53 barred the employer's reliance on the doctrine of comparative negligence in an action under the Jones Act, 46 U.S.C. § 688, for a seaman's injury caused by his employer's violation of a Coast Guard safety regulation implementing the Commercial Fishing Industry Vessel Safety Act of 1988, 46 U.S.C. § 4502?

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RESPONSE TO STATEMENT OF THE CASE

A. Statement of Facts.

1. Mr. Fuszek Was Employed By Royal Seafoods On The F/T ROYAL KING As A Baader Technician, Charged With Operating A Defective Fish Processing Machine Which Violated Coast Guard Regulations.

Vilmos Fuszek was employed on the factory trawler F/T ROYAL KING as a fish processing machine technician. (Pet. App. 19) In February 1993, the ROYAL KING was fishing and processing cod in the Bering Sea off of the coast Alaska. (Pet. App. 19) Mr. Fuszek was assisting in the operation of a Baader 99 machine on board the F/T ROYAL KING. The Baader 99 is a fish processing machine designed to filet cod fish. (Pet. App. 20) The machine was designed to process fish in a circular fashion, cutting the filets and returning the unusable bones and carcass to the initial point of entry, where they are dumped onto an offal conveyor running underneath the machine. (Tr. Exs. A-13, A-14)

The U.S. Coast Guard exercises authority over the working conditions aboard factory trawlers under the Commercial Fishing Industry Vessel Safety Act of 1988, 46 U.S.C. § 4502 (App. 1-5). The Act authorizes the Coast

Guard to regulate equipment on board vessels in order to eliminate or mitigate the risk of serious injury. 46 U.S.C. § 4502(b)(2)(G). Operation of a vessel in violation of the Act "or a regulation prescribed under" the Act is prohibited. 46 U.S.C. § 4504. Pursuant to its authority under the Act, the Coast Guard enacted a regulation requiring that all exposed machinery on board a vessel which can cause injury to personnel, such as gearing, contain suitable hand covers. 46 C.F.R. § 28.215. *See* 56 Fed. Reg. 40364, 40374 (1991).

As originally designed, the Baader 99 had safety rails and filet conveyors which extended on either side of the machine and provided inherent guarding of the machine. However, petitioners had modified the machine, removing the safety rails, and the filet conveyors underneath the rail, and the offal conveyor. (Tr. Exs. A-13, A-14) Despite these modifications (or because of them) the machine functioned poorly. The captain of the F/T ROYAL KING described the Baader 99 on board his vessel as a "piece of junk." (Pet. App. 20) It frequently jammed, causing processing delays. The machine ran only with the constant intervention of the factory superintendent, and Mr. Fuszek, who cleared jams and repaired breakdowns. (Pet. App. 20)

The cod season in Alaska is a short one. The economics of the fishing industry are risky and the pressure to keep production high on the F/T ROYAL KING was enormous. (Pet. App. 20) As a result, the factory superintendent on board the F/T ROYAL KING adopted the policy of clearing jams in the machine without turning the machine off. (Pet. App. 21) Because stopping the machine meant interrupting production, the factory superintendent and the Baader technician corrected the frequent jams by reaching into the machine to clean out the jammed fish debris by hand while the machine was still running. (Pet. App. 21)

2. While Working On Board The F/T ROYAL KING Mr. Fuszek Suffered Permanent Injuries When His Hand Was Caught In The Gears Of The Processing Machine.

On February 28, 1993, Mr. Fuszek was operating the Baader 99 machine, processing cod caught by the F/T ROYAL KING in the Bering Sea. (Pet. App. 19-20) When a piece of fish debris became lodged in the machine, Mr. Fuszek reached in with his gloved right hand to clear the debris without turning the machine off. His gloved hand became caught in a moving gear while he was attempting

to clear the debris. The gear pulled Mr. Fuszek's hand into the machine, resulting in a serious laceration and crushing injury to his right hand and severing of nerves, tendons and muscles in his hand. (Pet. App. 20, 23)

Mr. Fuszek underwent surgery to his hand at Adak, Alaska. He had two more operations upon returning home to Seattle. At the time of trial two years after the injury, he still suffered from a loss of sensation, irritation or causalgia, loss of use and dexterity, and scarring. (Pet. App. 23)

B. Proceedings Below.

1. The District Court's Decision.

In Mr. Fuszek's Jones Act claim against petitioners, the district court found that the vessel owner and employer were negligent in maintaining a defective machine, in pressuring the crew to keep production going in the face of the numerous mechanical breakdowns, and in adopting the practice of reaching in by hand to clear the machine when it jammed. (Pet. App. 21) The district court also found that the vessel owner and employer violated the Coast Guard safety regulation, 46 C.F.R. § 28.215, which requires that "suitable hand covers, guards, or railing must be installed in machinery which can cause injury to personnel,

such as gearing, chain or belt drives, and rotating shafting." (Pet. App. 21)

The district court held that Mr. Fuszek and the factory superintendent had cleared debris from the machine many times in the past without getting their hands caught. Therefore, Mr. Fuszek must have been inattentive when he was injured this time. (Pet. App. 21-22) The district court did not, as petitioners contend, find that Mr. Fuszek was primarily responsible for the dangerous condition that caused his injury - the removal of the hand guard in violation of a Coast Guard regulation. Instead, the district court held that Mr. Fuszek was negligent in reaching into the machine "in a way that allowed his hand to be caught." (Pet. App. 22) The district court charged Mr. Fuszek with 25% comparative negligence, placing 75% of the responsibility for the injury on the petitioners.

2. The Ninth Circuit's Opinion.

The Ninth Circuit Court of Appeals reversed the district court's reduction of Mr. Fuszek's judgment for comparative negligence. Following the only other Circuit Court of Appeals decision on the issue, ***Roy Crook & Sons, Inc. v. Allen***, 778 F.2d 1037 (5th Cir. 1985), the Court of Appeals held that "an

employer's violation of a statute or regulation designed to protect employees precludes a district court, sitting in admiralty, from considering the comparative fault of the injured employee-claimant" under Section 53 of FELA, 45 U.S.C. § 53, incorporated into the Jones Act by 46 U.S.C. § 688(a). (Pet. App. 11)

ARGUMENT FOR DENYING THE PETITION

The petitioners asks this Court to review a Court of Appeals decision construing the plain language of an unambiguous statute consistent with the opinion of another circuit of the Court of Appeals. The decision of the Court of Appeals does not meet any of this Court's criteria for certiorari under Sup. Ct. R. 10. This Court should deny the petition because the decision below was a correct interpretation of federal law.

A. The Plain Language Of Section 53 Precludes The Imposition Of Comparative Negligence Where, As Here, The Employee's Injuries Are Caused, In Whole Or Part, By The Employer's Violation Of A Statutory Duty Of Safety.

The Court of Appeals decision construes a plain and unambiguous statute. Congress rejected the reduction of a seaman's damages for comparative negligence where the

seaman's injury was caused, in whole or in part, by the employer's violation of a safety statute under Section 53 of the Federal Employer Liability Act ("FELA") 45 U.S.C. § 53. Rather than constituting a "departure from the accepted and usual course of judicial proceedings," Sup. Ct. R. 10, the Court of Appeals opinion adopts the only logical interpretation of Section 53 based upon its clear language.

Section 53 of FELA unambiguously precludes **any** reduction of an employee's injuries for comparative negligence where the employer's violation of a safety statute contributes to the employee's injury:

> . . . [T]he fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee; *Provided,* That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

45 U.S.C. § 53.

The Jones Act expressly grants to seamen all the rights and remedies available to railroad workers under FELA:

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law . . . and in such action all statutes of the Unites States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; . . .

46 U.S.C. § 688. Section 53 of FELA, including its prohibition against comparative negligence upon a finding of an employer's violation of a safety statute, is part and parcel of the rights and remedies granted to respondent under the Jones Act.

Petitioners' dissertation on the role of comparative fault in admiralty jurisprudence is wholly irrelevant to the issue at hand because Congress has enacted an unambiguous statute that precludes the imposition of comparative negligence where a violation of a safety statute has contributed to a seaman's death in a Jones Act case. This Court has noted that it may not ignore the plain language of a statute merely because Congress enacted a rule with which the Court may disagree:

> When [Congress] does speak directly to a question, the courts are not free to supplement Congress's answer so thoroughly that the Act becomes meaningless.

Miles v. Apex Marine Corp., 498 U.S. 19, 31, 111 S. Ct. 317, 325, 112 L. Ed. 2d 275 (1990) (quotation omitted). Moreover, the cases relied upon by petitioners in their discussion of the doctrine of comparative negligence involve the application of the doctrine to claims for property damages under admiralty law or personal injuries under general maritime law. *See, e.g.*, ***McDermott, Inc. v. AmClyde***, 511 U.S. 202, 114 S. Ct. 1461, 128 L. Ed. 2d 148 (1994)(property damages under admiralty); ***United States v. Reliable Transfer***, 421 U.S. 397, 95 S. Ct. 1708, 44 L. Ed. 2d 251 (1975)(same); ***Pope & Talbot, Inc. v. Hawn***, 346 U.S. 406, 74 S. Ct. 202, 98 L. Ed 143 (1953)(personal injuries under admiralty law of negligence and unseaworthiness) (all cited in Petition at 6). They provide no guidance on the construction of the Jones Act, and conversely, the Court of Appeals decision has no effect on their enunciation of principles of admiralty.

B. Petitioners Breached A Statutory Duty Of Safety By Removing Hand Guards From A Processing Machine In Violation Of A Regulation Enacted Under The Commercial Fishing Industry Vessel Safety Act.

Petitioners breached a statutory duty enacted for the safety of employees. The Coast Guard regulation

requiring suitable hand guards, 46 C.F.R. § 28.215, was promulgated pursuant to 46 U.S.C. § 4502(b) which authorizes safety "regulations requiring the installation, maintenance and use of equipment . . . required to minimize the risk of injury to the crew during vessel operations . . ." 46 U.S.C. § 4502(b)(1)(2)(G). 46 U.S.C. § 4502 was part of the Commercial Fishing Industry Vessel Safety Act of 1988. The House Report recites that one of the purposes of the Act was "to establish new and more comprehensive safety requirements for commercial fishing industry vessels." 1988 ***U.S. Code Cong. and Admin. News*** p. 2149-52. The Report pointed out that, "Overall, commercial fishing is one of the most dangerous occupations in the United States . . ." and concluded:

> The dilemma for fishermen is made more severe by the fact that safety problems . . . are in turn exacerbated when economic pressures force boat operators to fish in harsher weather or further from shore than normal, or to postpone or neglect needed safety improvements.

Id. at 2150, 2151-52. The Act prohibits the operation of any vessel in violation of regulations prescribed under the Act, 46 U.S.C. § 4504, and makes the owner, managing operator, agent, master, and individual in charge of the vessel all liable for a violation. 46 U.S.C. § 4507.

Congress enacted these statutes "for the safety of employees" within the meaning of FELA § 53. Congress even noted that the statutory scheme was all the more necessary because the very financial pressures that the district court found existed in this case might cause vessel owners "to postpone or neglect needed safety improvements." (Pet. App. 20-21) The Court of Appeals correctly held that petitioners breached a statutory duty enacted for the safety of seamen-employees such as Mr. Fuszek by removing the hand guard from the Baader 99 machine aboard the F/T ROYAL KING.

C. The Court Of Appeals Decision Follows This Court's Precedent Interpreting The Jones Act And Is In Accord With The Only Other Court Of Appeals Decision Addressing FELA Section 53's Prohibition Of Comparative Negligence Under The Jones Act.

The Court of Appeals decision comports with this Court's Jones Act precedent and is in accord with the only other Court of Appeals decision that addresses the application of comparative negligence in a Jones Act case upon an employer's violation of a safety statute.

In ***Kernan v. American Dredging Co.***, 355 U.S. 426, 78 S. Ct. 394, 2 L. Ed. 2d 382 (1958), this Court relied upon the language of FELA Sections 53 and 54 in holding

that the violation of a Coast Guard regulation established negligence per se under the Jones Act. Although not squarely addressing the application of comparative negligence upon a vessel owner's violation of a safety regulation, the ***Kernan*** Court quoted 45 U.S.C. § 54, which uses the term "any statute enacted for the safety of employees," in holding that the violation of **any** statutory safety duty, including violations of safety regulations, established negligence per se. 355 U.S. at 438 n.8. The Court of Appeals decision is in accord with ***Kernan***.

The Court of Appeals decision also follows the only other Circuit which has addressed the application of Section 53's proviso in a Jones Act case. In ***Roy Crook and Sons v. Allen***, 778 F.2d 1037 (5th Cir. 1985), the Fifth Circuit held that Section 53 of FELA barred a vessel owner's reliance on comparative negligence because the vessel was undermanned, a violation of the manning statute, 46 U.S.C. § 222, which authorizes the Coast Guard to determine the size of the crew required on vessels. The Fifth Circuit held that the manning statute was "enacted for the safety of employees" within the meaning of Section 53, that violation of the statute contributed to the seaman's death, and reversed a reduction of the judgment for comparative negligence.

Petitioners do not argue that the Court of Appeals decision conflicts with a decision from another circuit of the Court of Appeals, nor do they even cite the Fifth Circuit's decision. The Court of Appeals decision breaks no new ground. The petition presents no issue justifying review by certiorari.

D. The Court Of Appeals' Decision Is In Accord With This Court's Precedent Holding That Congress Intended FELA And The Jones Act To Provide A Flexible And Evolving Remedy To Injured Employees.

Petitioners present a misleadingly narrow view of the caselaw construing Section 53 of FELA and the Jones Act, ignoring the liberal interpretation this Court has given to these remedial statutes. For instance, petitioners ignore eighty years of Supreme Court precedent holding that Congress meant what it said in eliminating comparative negligence for employees' violations of a safety statute under Section 53. *See,* ***Rogers v. Missouri Pacific Railroad Co.***, 352 U.S. 500, 507 n.13, 77 S. Ct. 443, 1 L. Ed. 2d 493 (1957) ("Proof of violation of certain safety appliance statutes without more provides negligence and also eliminates contributory negligence as a consideration for any purpose."); ***Coray v. Southern Pacific Co.***, 335

U.S. 520, 524, 69 S. Ct. 275, 93 L. Ed. 208 (1949) ("And to make its purpose crystal clear, Congress has also provided that 'no such employee shall be held to have been guilty of contributory negligence in any case' where a violation of the Safety Appliance Act, such as the one here, 'contributed to the death of such employee.'"); ***Seaboard Airline v. Horton***, 233 U.S. 492, 503, 34 S. Ct. 635, 58 L. Ed. 1062 (1914) (Congress declared in Sections 53 and 54 of FELA that neither contributory negligence nor assumption of risk "shall avail the carrier in cases where the violation of a statute has contributed to the injury or death of the employee").

Congress gave seamen-employees the benefit of "all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees. . ." 46 U.S.C. § 688. Remarkably, petitioners contend that this unambiguous statute made no change to the remedies available to seamen under admiralty law, arguing that the evolution of maritime law provides sufficient remedies for an injured seaman. (Petition at 8-9, 12) But the existence of other remedies to seamen under the doctrine of unseaworthiness is wholly irrelevant to the construction of the statutory remedy at issue in this case.

This Court has consistently held that the Jones Act gives injured seamen the same rights and remedies given to injured railway workers under FELA. *See* ***Kernan v. American Dredging Co.***, 355 U.S. 426, 439, 78 S. Ct. 391, 401, 2 L. Ed. 2d 382 (1958) (Jones Act "expressly provides for seamen the cause of action - and consequently the entire judicially developed doctrine of liability - granted to railroad workers by the FELA"); ***Panama R. Co. v. Johnson***, 264 U.S. 375, 388, 44 S. Ct. 391, 394, 68 L. Ed. 748 (1924) (Jones Act brings into law of admiralty "new rules drawn from another system and extends to injured seamen a right to invoke, at their election, either the relief accorded by the old rules or that provided by the new rules."). In the rare case where the literal application of FELA would frustrate Congress' purpose of providing seamen liberal rights of recovery, the Court has expanded, not narrowed, Jones Act remedies:

> The Jones Act, in providing that a seaman should have the same right of action as would a railroad employee, does not mean that the very words of the FELA must be lifted bodily from their context and applied mechanically to the specific facts of maritime events. Rather, it means that those contingencies against which Congress has provided to ensure recovery to railroad

> employees should also be met in the admiralty setting.

Cox v. Roth, 348 U.S. 207, 209, 75 S. Ct. 242, 99 L. Ed. 260 (1955) (cited in Petition at 11).

Petitioner's policy argument, that excusing employers' violation of statutory duties designed to protect employees would advance safety, turns logic on its head. Comparative negligence remains the general rule under Section 53 of FELA. Thus, where Congress has not imposed a statutory duty of safety upon an employer, the employer and employee share responsibility for an employee's damages in proportion to their respective fault. But Congress has chosen to secure employers' compliance with statutory standards of safety by prohibiting a reduction of an employee's judgment for comparative negligence where the employer's violation of a safety statute contributes to the employee's injury. That Congress has chosen to impose specific duties of safety on employers in one of the nation's most dangerous occupations by delegating that task to an administrative agency with specific expertise in the area is neither unusual nor contrary to the policies of FELA or the Jones Act.

This Court has long held that Congress has the power to delegate to an administrative agency the task of formulating specific rules to govern the conduct of an industry by enacting legislation that speaks to broad issues of policy:

> The judicial approval accorded these "broad" standards for administrative action is a reflection of the necessities of modern legislation dealing with complex economic and social problems. . . . The legislative process would frequently bog down if Congress were constitutionally required to appraise beforehand the myriad situations to which it wishes a particular policy to be applied and to formulate specific rules for each situation.

American Power & Light Co. v. Securities & Exchange Comm'n., 329 U.S. 90, 105, 67 S. Ct. 133, 142, 91 L. Ed. 103 (1946). There is nothing "unwise" (Petition at 8) in requiring vessel owners to comply with the Coast Guard's safety requirements for fishing vessels that have been duly enacted under Congress' statutory mandate "to minimize the risk of injury to the crew during vessel operations." 46 U.S.C. § 4502(b)(2)(G).[1] Petitioners would

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[1] Petitioners' contention that the Coast Guard regulation at issue, 46 C.F.R. § 28.215, is "ambiguous" in requiring "suitable hand covers" (Pet. at 7-8) is particularly disingenuous insofar as the Baader 99 machine aboard petitioners' vessel had no hand guards whatsoever. (Pet. App. 21-22)

limit the remedies available under Section 53 to those specific statutory duties existing for railroad workers in 1908, ignoring both Congress' intent to broaden the remedies available to seamen by enacting the Jones Act and the legislative need to delegate the complex task of regulating a dangerous industry to the administrative agency with safety expertise.

Contrary to petitioners' argument, the prohibition against comparative negligence upon a finding of an employer's safety statute violation promotes safety on board fishing vessels by placing responsibility on the party with the resources and primary control over the conditions of the vessel. *See also* 46 U.S.C. § 4507 (imposing civil and criminal penalties for violation of Commercial Fishing Industry Vessel Safety Act on "owner, charterer, managing operator, agent, master and individual in charge of a vessel"). Surely the fishing vessel owner, who maintains a vessel season after season, is in a better position to secure a safe vessel and equipment than is the employee, whose employment is only temporary and whose presence on the vessel may be no more than transitory. In any event, this is a policy judgment which Congress has already made, and not one for the Court.

CONCLUSION

This is a petition for certiorari from an opinion interpreting an unambiguous statute in accordance with the decisions of this Court and another circuit Court of Appeals. This Court should deny the petition for certiorari.

RESPECTFULLY SUBMITTED this 26th day of February, 1997.

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46 U.S.C. § 4502. Safety standards

(a) The Secretary shall prescribe regulations which require that each vessel to which this chapter applies shall be equipped with—

(1) readily accessible fire extinguishers capable of promptly and effectively extinguishing a flammable or combustible liquid fuel fire;

(2) at least one readily accessible life preserver or other lifesaving device for each individual on board;

(3) an efficient flame arrestor, backfire trap, or other similar device on the carburetors of each inboard engine which uses gasoline as fuel;

(4) the means to properly and efficiently ventilate enclosed spaces, including engine and fuel tank compartments, so as to remove explosive or flammable gases;

(5) visual distress signals;

(6) a buoyant apparatus, if the vessel is of a type required by regulations prescribed by the Secretary to be equipped with that apparatus;

(7) alerting and locating equipment, including emergency position indicating radio beacons, on vessels that operate on the high seas; and

(8) a placard as required by regulations prescribed under section 10603(b) of this title.

(b)(1) In addition to the requirements of subsection (a) of this section, the Secretary shall prescribe regulations requiring the installation, maintenance, and use of the equipment in paragraph (2) of this subsection for documented vessels to which this chapter applies that—

(A) operate beyond the Boundary Line;

(B) operate with more than 16 individuals on board; or

(C) in the case of a fish tender vessel, engage in the Aleutian trade.

(2) The equipment to be required is as follows:

(A) alerting and locating equipment, including emergency position indicating radio beacons;

(B) lifeboats or liferafts sufficient to accommodate all individuals on board;

(C) at least one readily accessible immersion suit for each individual on board that vessel when operating on the waters described in section 3102 of this title;

(D) radio communications equipment sufficient to effectively communicate with land-based search and rescue facilities;

(E) navigation equipment, including compasses, radar reflectors, nautical charts, and anchors;

(F) first aid equipment, including medicine chests; and

(G) other equipment required to minimize the risk of injury to the crew during vessel operations, if the Secretary determines that a risk of serious injury exists that can be eliminated or mitigated by that equipment.

(c)(1) In addition to the requirements described in subsections (a) and (b) of this section, the Secretary may prescribe regulations establishing the standards in paragraph (2) of this subsection for vessels to which this chapter applies that—

(A)(i) were built after December 31, 1988, or undergo a major conversion completed after that date; and

(ii) operate with more than 16 individuals on board; or

(B) in the case of a fish tender vessel, engage in the Aleutian trade.

(2) The standards shall be minimum safety standards, including standards relating to—

(A) navigation equipment, including radars and fathometers;

(B) lifesaving equipment, immersion suits, signaling devices, bilge pumps, bilge alarms, life rails, and grab rails;

(C) fire protection and firefighting equipment, including fire alarms and portable and semiportable fire extinguishing equipment;

(D) use and installation of insulation material;

(E) storage methods for flammable or combustible material; and

(F) fuel, ventilation, and electrical systems.

(d)(1) The Secretary shall prescribe regulations for the operating stability of a vessel to which this chapter applies—

(A) that was built after December 31, 1989; or

(B) the physical characteristics of which are substantially altered after December 31, 1989, in a manner that affects the vessel's operating stability.

(2) The secretary may accept, as evidence of compliance with this subsection, a certification of compliance issued by the person providing insurance for the vessel or by another qualified person approved by the Secretary.

(e) In prescribing regulations under this chapter, the Secretary—

(1) shall consider the specialized nature and economics of the operations and the character, design, and construction of the vessel; and

(2) may not require the alteration of a vessel or associated equipment that was constructed or manufactured before the effective date of regulation.

(f) To ensure compliance with the requirements of this chapter, at least once every 2 years the Secretary shall examine—

(1) a fish processing vessel; and

(2) a fish tender vessel engaged in the Aleutian trade.